

ASSOCIATION OF LEGAL PROFESSIONALS ~ ALP

May 22, 2013

Alex Gurza
Deputy City Manager
City of San Jose
200 E. Santa Clara Street
San Jose, California 95113

Dear Mr. Gurza:

This responds to your letter of May 15, 2013 sent to the Association of Legal Professionals ("ALP"). This letter does not respond to the "Retiree Healthcare Modified Proposal" that you sent to ALP later the same day. The response to the proposal will be made under separate cover.

The central point of your letter is to disagree with ALP's position on the five-year phase-in schedule based on the assertion that "[s]ince 2009, the Annual Required Contribution has always been scheduled to begin in 2013-2014." This assertion begs the question of whether the approved retiree healthcare funding plan supports the City's "schedule" for beginning payment of the ARC. It does not!

The letter fails to point to any language in the approved retiree healthcare funding plan stating that the ARC begins in the first pay period of fiscal year 2013-2014. The obvious reason is that there is no such language. To the contrary, the language in the approved retiree healthcare funding plan supports ALP's position.

As ALP explained in its letter to the Retirement Board dated May 13, 2013, **on which you were copied**, the approved retiree healthcare funding plan includes the following language:

The phase-in to the ARC shall be divided into five steps
(using the straight line method) . . .

As ALP pointed out, the "straight line method" is an accounting term that refers to calculating depreciation by taking an equal amount of the asset's cost as an expense for each year of the asset's useful life. As ALP explained, using the "straight line method" in the context of the approved plan demonstrates that each of the five steps was intended to be equal. An incremental increase of not more than .75% in each of the first four steps with payment of the ARC at the beginning of the fifth step is not consistent with using the "straight line method." Your letter does not address this language.

ALP also pointed out that the approved retiree healthcare funding plan expressly states that each step will "be effective on the first pay period of the City's fiscal year in each succeeding year." This language shows the City knew how to draft a provision making a contribution increase effective at the beginning of the fiscal year. The City chose not to use this language in stating when payment of the ARC would become effective. With regard to payment of the ARC, the City chose to use the following language:

Notwithstanding the limitations on the incremental increases, **by the end of the five year phase-in**, the City and plan members shall be contributing the full Annual Required Contribution. . . (Emphasis added.)

As ALP stated in its letter to the Retirement Board, interpreting "by the end of the five year phase-in" to mean "at the beginning of the fifth year of the five year phase-in" unreasonably contorts the plain meaning of the language to suit the City's position.¹ Your letter does not address this language.

Outside of the context of advocating a position for the City or negotiating with its bargaining units, even the City embraces the clear meaning of the language used in the approved retiree healthcare funding plan. As ALP pointed out to you in its letter dated May 14, 2013, Employee Relations own public website, which is a part of the City Manager's official internet site for the City, states with no uncertainty:

At the end of the five (5) year phase-in the City and employee would be required to begin making the full ARC payments.

Your May 15, 2013 letter to ALP does not refute this statement.

The most the City could argue is that – when taken out of the context of the other language – the phrase "by the end of the five year phase-in" is ambiguous because it does not indicate whether payment of the ARC occurs at the beginning, end, middle or some other point during the fifth fiscal year. Your letter tacitly acknowledges this ambiguity by being carefully worded to assert only that the ARC "has always been

¹ The City acknowledges this problem in its last two retiree healthcare proposals to the bargaining units. In each of those proposals, the City rewrote the above language as follows:

Notwithstanding the limitations on the incremental increases, **by the first payperiod of Fiscal Year 2014-2015**, the City and plan members shall be contributing the full Annual Required Contribution in the ratio currently provided under Section 3.28.385 of the San Jose Municipal Code. (Bold added.)

scheduled to begin in 2013-2014." This wording also begs the question of when specifically during 2013-2014 the payment of the ARC has been scheduled to begin.

The City's position as set forth in your letter is contrary to the plain language of the approved retiree health care funding plan and to the meaning of that language as stated on Employee Relations own website. Nevertheless, the City is not willing to even admit the language it drafted is ambiguous. Presumably, this is because doing so would mean the City would have to negotiate with its bargaining units over exactly when the payment of the ARC begins. More importantly, the City would lose its leverage to extract concessions from its bargaining units on other labor issues, as it is now attempting to do.

At its essence, your letter relies on the underlying premise that payment of the ARC starts at the beginning of fiscal year 2013-2014 because the City has "always" taken this position "since 2009." Obviously, the above-quoted statement from Employee Relations own public website calls this premise into question. Moreover, repeating a misstatement over and over does not make it true. A person can say the world is flat as many times and as loudly as the person wants – but doing so is not evidence that the world is flat!

Your letter also makes the rather odd reference to ALP not having made a counter proposal to the City. Given ALP's position regarding when payment of the ARC begins, a counter proposal is unnecessary. A counterproposal would put ALP in the position of negotiating against itself. ALP is not going to do that!

ALP apologizes if it has "perplexed" anyone with its rather oblique reference to the City hiding "behind the dark veil of the 'bargaining table.'" All ALP meant is that it has consistently advocated for having open and public negotiations. ALP believes such an approach is consistent with Mayor Reed's stated goal of bringing greater "sunshine" and transparency to the government. The City has rejected this approach, preferring instead to conduct labor negotiations behind closed doors and to have employee relations meet regularly in closed session to discuss labor issues. Unlike negotiations, the written documents exchanged by the parties are made **public** because they are posted on the City's website.

Finally, ALP would like to assure the citizens of San Jose, the City Manager and the City Council that it is **completely** committed to working cooperatively with the City as a partner to find solutions to the retiree healthcare issues. ALP's past actions – and more broadly the past action of the attorneys in the City Attorney's Office – show that this commitment has substance. Despite having many differences with the City over labor issues, ALP has shown an ability to come up with creative solutions to problems and to reach agreements with the City. Most recently, ALP has reached some level of agreement with the City's labor negotiating team on all the provisions of ALP's first MOU except one, and believes it is on the verge of an agreement on that one.

outstanding provision. However, ALP's commitment to work as a partner with the City does not mean that ALP will accept being treated unfairly, or that it will allow itself to be bullied by the City's pursuit of unreasonable and hyper-aggressive positions against its active employees.

ALP looks forward to when the City and bargaining units can move beyond this relatively insignificant issue and devote their respective time and energies on the real issue at hand – finding a permanent, comprehensive solution to retiree healthcare!

Very truly yours,

ASSOCIATION OF LEGAL PROFESSIONALS



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President

cc: Mayor and Council Members
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